In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-203

MORTON EISEN, on Behalf of Himself and All other Purchasers and Sellers of "Odd-Lots" on the New York Stock Exchange Similarly Situated,

Petitioner,

v.

CARLISLE & JACQUELIN and DECOPPET & DOREMUS, Each Limited Partnerships Under New York Partnership Law, Article 8 and NEW YORK STOCK EXCHANGE, an Unincorporated Association.

Brief of the State of California, Amicus Curiae

EVELLE J. YOUNGER
Attorney General,
State of California,

ANTHONY C. JOSEPH
Assistant Attorney General

MICHAEL I. SPIEGEL
Deputy Attorney General
6000 State Building
San Francisco CA 94102

BORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

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INTEREST OF THE STATE OF CALIFORNIA

The State of California files this amicus curiae brief in support of plaintiff Morton Eisen pursuant to Rule 42 of the Rules of this Court.

The State of California has a substantial interest in the development and application of Rule 23, F.R.C.P. for the purpose of adjudicating the rights and claims of its citizens. The State is particularly interested in class actions on behalf of citizen consumers who because of the small size of

their individual claims will be unable to recover damages in the absence of effective class action rules. California itself has filed consumer class actions with the State acting through its attorney general as a representative party.[1]

California directs its attention in this brief to "Fluid Recovery" a concept necessary for the protection of the interest of California's citizens, effective private enforcement of the antitrust and other laws, and efficient judicial administration of complex litigation.

Since states cannot represent citizen consumers Parens Patriae, *California v. Frito Lay, Inc.*, 474 F.2d 774. (9th Cir. 1973.) Cert. denied 412 U.S. 908 (1973), the only remaining remedy for injured consumers who are unable to bring their own action is a consumer class action. *Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266 (1972); *Vasquez v. Superior Court* 4 Cal.3d 800, 807-8, 484 P.2d 964 (1971); *Daar v. Yellow Cab Co.* 67 Cal.2d 695, 715, 433 P.2d 732 (1967). The consumer class action, however, would be a meaningless gesture without "Fluid Recovery".

ARGUMENT

Fluid Recovery Is Proper and Workable

"Fluid Recovery" occurs when the representative party in a Rule 23 class action litigates the issue of damages on behalf of the entire class as a whole without requiring individual class members to appear. Evidence of the damages sustained by the entire class is presented to the trier of fact, consistent with the standards in *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946), and a lump sum judgment is entered against defendants and in favor of the class as a

1. *State of California v. Chas. Pfizer & Co. Inc.*, et al., D.Minn. 4-71 Civ. 399; *State of California v. Bristol Myers*, et al., D.D.C. Civ. 2181-71.

whole. Thereafter, the judgment fund is available to the class members under the supervision of the district court.

In effect, defendants' liability is determined as a whole rather than as a sum of its parts. Since "a whole is equal to the sum of its parts" defendants are not exposed to any more than a single, albeit, total accounting under the law for their wrongdoing.

Either the denial of a class action or allowance of a consumer class action without "Fluid Recovery" permits defendants to utilize legal procedures to minimize their liability by discouraging or preventing participation in the litigation by potential class members. The practical result is that the courts become a shield for wrongdoers, a concept alien to any system of justice.

The issue in an industry where the products affected by an antitrust conspiracy are purchased in small quantities by consumers who seldom keep receipts of their purchases was aptly characterized by the district court in *California v. Frito Lay, Inc.*, 333 F.Supp. 977, (CD Calif. 1971) rev'd 474 F.2d 774 (9th. Cir. 1973) Cert. denied 412 U.S. 908 (1973).

> ". . . But what corporation would not risk violation of the antitrust laws where maximum penalties are miniscule compared to the potential harm to a public unable to meet the 'technical' requirements of proof of damage? Or, even more to the point—what corporation would risk violation of the antitrust laws if they were assured every penny of conspiratorial gain, three times over, were the ultimate result of a proven price-fixing conspiracy? Putting the question is its own obvious answer. . . ." (Id. at 981).

Similarly, Judge Miles Lord in approving "Fluid Recovery" in the antibiotic drug cases stated:

> ". . . The most misleading of their [defendants'] arguments characterizes a class-wide recovery as a

> 'pot of gold' which the plaintiffs and their counsel are somehow not entitled to receive. If we assume that a price-fixing conspiracy is proven at trial, however, the defendants will certainly have no right to the 'pot of gold' created by their illegal activities. And the success of their scheme and the size of the 'pot' would certainly be no basis for leaving the money in their hands." *In re Antibiotic Antitrust Action*, 333 F.Supp. 278, 287 (S.D.N.Y. 1971).

The problem of disposition of unclaimed funds after a "Fluid Recovery" ought not to inhibit use of the concept. Certainly, a wrongdoer's liability should not be mitigated and the fruits of his wrongdoing become his windfall because the "true owner" does not come forward. This kind of problem has never stifled the ingenuity of courts.[2]

> "It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved." *United States v. Morgan* 307 U.S. 183, 194 (1939).

In *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77 (S.D.N.Y. 1970) aff'd 446 F.2d 1301 (2nd Cir. 1971) Cert. denied 404 U.S. 1005 (1971) the court when considering the necessity of developing equitable remedies quoted as follows from *Mills v. Electric Autolite Co.*, 396 U.S. 375 (1970):

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2. See *Bebchick v. Public Utilities Commission*, 318 F.2d 187, 203 (D.C. Cir.), Cert. denied, 373 U.S. 913 (1963); *Securities and Exchange Commission v. Texas Gulf Sulphur Co.*, 312 F.Supp. 77 (S.D.N.Y. 1970). *Market St. Ry. Co. v. Railroad Commission* 28 Cal.2d 363, 171 P.2d 875 (1946).

Initially class members would claim against the judgment fund. Unclaimed funds would be administered by the court under its broad powers of equity. See *Daar v. Yellow Cab*, supra, n. 15 at 715.

Escheat is a final resort.

See *United States v. Klein* 303, U.S. 276 (1938).

"We [the Supreme Court] held in *Borak* that upon finding a violation the courts were 'to be alert to provide such remedies as are necessary to make effective the congressional purpose,' noting specifically that such remedies are not to be limited to prospective relief. 377 U.S., at 433, 434 [84 S.CT. 1555, 1560, 12 L.Ed 2d 423]. • • • In selecting a remedy the lower courts should exercise 'the sound discretion which guides the determination of courts of equity,' keeping in mind the role of equity as 'the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' *Hecht Co. v. Bowles,* 321 U.S. 321, 329-330 [64 S.Ct. 587, 591-592, 88 L.Ed. 754] (1944)." 312 F.Supp. at 91-2.

The court then continued:

"Therefore, the court may, on the basis of Section 27, fashion an appropriate remedy to effectuate the purpose of the 1934 Act, and to deter future violations of Section 10(b) and Rule 10b-5." Id. at 92.

Fluid Recovery Is Not a Novel Procedure

A procedure of adjudicating in lump sum the claims of absent class members is not novel. Indeed before Eisen III, such a procedure was approved by the Second Circuit. In *Dickinson v. Burnham* 197 F.2nd 973 (2nd. Cir. 1952), the court not only approved a "Fluid Recovery" but held that plaintiffs (counter-claim defendants) were not entitled to depose and call individual class members before the jury.[3]

3. In *Dickinson* following an appeal, a class action was brought against the plaintiff in the original proceedings by an intervenor. The action was to recover money allegedly obtained by plaintiff by fraud. The trial court decided that the action was a spurious class action under old Rule 23. Following the trial of the factual question of the existence of the fraud, the court deferred final judgment and sent notices to the members of the class. Ultimately 70 claims were filed out a class of 159. Judgment was entered against the plaintiff for the full amount he had fraudulently obtained from the *entire class.*

"Our question is . . . how far Dickinson can object to a transfer of the entire fund from his hands. As to this specific question we are quite clear that the present suit falls neatly within subdivision (2) of the rule, dealing with the disposition of a fund, and that the court had full power to deal with it as it did, acting with great care and most equitably. Obviously its solution was an eminently practical one; it declined to allow the wrongdoers to escape for some theoretical protection to or against persons who after all these years and having failed to respond to notice were surely not actually disposed to claim participation. By taking charge of the fund as it did, it afforded all necessary protection to the plaintiff [counter-claim defendant] while making a fair distribution to the actual parties in interest. And the result seems not merely practical, but legally sound (197 F.2d 979-80)

Plaintiff's [counter-claim defendant] claim for a plenary trial on the right of each intervener coming in after the interlocutory judgment, including the taking of depositions and a jury on each, was properly overruled. Plaintiff had already had his day in court as to his general liability; he could not relitigate his duty to the class as a whole. Left only was the question of "essentially supervisory jurisdiction over the distribution among the class" of those entitled to the fund." Id. at 980-981.

Similarly in *Daar v. Yellow Cab Co.*, Supra:

In an effort to undermine the sufficiency of the complaint, defendant argues that even if a class action were permitted, the appearance of each class member in court still would be required, "for each claimant must appear and testify to the facts, among many others, that he rode a taxicab within the statutory period, the number of such rides, the fare paid for each, and the special damages to him, if any, beyond those alleged in [plaintiff's] complaint. It is perfectly obvious

> that if [plaintiff] is allowed to maintain a class action, every single claimant must appear in court and prove his claim." However, the complaint alleges that the exact amount of the overcharge in each of the two counts is known to the defendant and can be ascertained therefrom. Assuming these facts to be true, as we must here, no appearance by the individual members of the class will be required to recover the full amount of the overcharges in each count. (67 Cal.2d 715-16).

In bondholder class actions "Fluid Recovery" has always been the practice e.g. *United States v. Klein* 303 U.S. 276 (1938).

Rule 23(d) F.R.C.P. by its own provisions contemplates broad discretion by the trial court in the framing of procedures for efficient judicial administration of class actions consistent with due process.[4] In this vein, trial courts should endeavor to adopt procedures such as "Fluid Recovery" that will eliminate the difficulties likely to be encountered in the management of a class action.

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4. 23(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

It is hypocritical for a court to blind itself to the use of modern techniques in resolving the problems presented by complicated litigation involving large numbers of claimants and large volumes of data and then find a class action to be unmanageable.[5]

CONCLUSION

Class actions are a necessary tool of judicial administration. The use of "Fluid Recovery" is in furtherance of the purposes of Rule 23, F.R.C.P. and promotes effective enforcement of substantive laws for the protection of numerous consumers with small claims. The use of the "Fluid Recovery" concept in the *Eisen* case should be approved by this Court.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General,
State of California,

ANTHONY C. JOSEPH
Assistant Attorney General

MICHAEL I. SPIEGEL
Deputy Attorney General
Amicus Curiae.

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5. Many solutions to class action problems are now and will continually be provided by the Manual issued by the Judicial Panel on Multidistrict Litigation.